Journal of Civil Rights and Economic Development

Volume 16
Issue 1 *Volume 16, Winter 2002, Issue 1*

Article 3

January 2002

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TAKING FAULT WITH NEW YORK'S FAULT-BASED DIVORCE: IS THE LAW CONSTITUTIONAL?

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INTRODUCTION

New York remains one of a handful of states in the country where it is still not possible to obtain a no-fault divorce unless there is the consent of both parties.[1] Following California's lead in 1970,[2] about half of the states have instituted "pure" no-fault divorce laws, which provide for divorce upon one party's claim that "irreconcilable differences have caused the irremediable

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1 *See* N.Y. DOM. REL. LAW §170 (6) (Consol. 2000) (giving permissible grounds for divorce); *see, e.g.,* MISS. CODE ANN. § 93-5-2 (1999) (requiring joint petition with separation agreement); TENN. CODE ANN. § 36-4-101(12) (2000) (requiring both parties to be in agreement on terms of marital dissolution before court will grant no-fault divorce). *See generally* Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States*, 21 FAM. L.Q. 417, 440-43 (1988) (pointing out all states have some form of no-fault divorce); Gary H. Nichols, *Covenant Marriage: Should Tennessee Join the Noble Experiment?*, 29 U. MEM. L. REV 397, 422 (1999) (stating claim of irreconcilable differences may not be pursued unilaterally by one party without consent of other); Doris Jonas Freed & Joel R. Brandes, *No More 'Messin' with Hessen*, N.Y.L.J. Aug. 17, 1988, at 3 (stating New York is only remaining jurisdiction in which "living separate and apart" is not grounds for divorce).

2 *See* CAL. FAM. CODE §§ 2310-2311 (Deering 2000); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 15 (The Free Press ed., Collier Macmillan Publishers 1985) (stating that under pure no-fault divorce fashioned in California, divorce could be obtained (1) without grounds, (2) without proving prove fault or guilt or taking any moral position, (3) by unilateral decision of one spouse, (4) without linking financial awards to fault, (5) with standards that are gender neutral and (6) with procedures aimed at reducing adversarial climate and fostering amicable divorce); *see also* Herbert Jacob, *The Silent Revolution: The Transformation of Divorce Law in the United States, reprinted in* 86 MICH. L. REV. 1121, 1123 (1988) (explaining that no-fault was technical cover for California's lenient divorce policy which had fostered visible industry of producing fraudulent evidence of marital fault under old fault statute). *See generally* Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 85-87 (1966) (pointing out that no-fault statutes containing "living separate and apart" provision assure law applies only to those marriages that have ceased to function).

breakdown of the marriage."[3] Of the remaining states, most have adopted laws that allow for unilateral divorce by one spouse based upon "living apart and separately" for some specified time period.[4]

The New York statute does not require that fault be proven for divorce if both parties have consented to a separation agreement.[5] After living apart for one year and upon substantial performance of this agreement, the parties can be divorced under New York law.[6] A mutually agreed upon separation agreement, substantially performed after one year, is the only means whereby a no-fault divorce may be secured under the New York law.[7]

If there is no mutual agreement to separate and one spouse contests the other spouse's action for a divorce, the divorce action can only be maintained under New York law if a fault ground is sufficiently pleaded.[8] The practical result of a contested divorce is that an adversarial proceeding is required in which the plaintiff must prove the defendant's fault.[9] If proven, the court will impose moral labels on the parties with the defendant designated as the guilty party, responsible for the divorce, and

[3] *See* Linda D. Elrod & Robert G. Specter, *A Review of the Year in Family Law: Of Welfare Reform, Child Support, and Relocation*, 30 FAM. L.Q. 765, 807 (1997) (categorizing States on basis of whether no-fault is sole ground of divorce or one of several grounds). *See generally* Nichols, *supra* note 1, at 422 (discussing treatment of irreconcilable differences in marriages under Tennessee law); Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 269-71 (1997) (observing that many state legislatures enacted no-fault divorce without significant debate); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 93-95 (1991) (identifying certain arguments in favor of no-fault divorce).

[4] *See* Elrod & Specter, *supra* note 3, at 807 (listing Arkansas and Pennsylvania as requiring three years; Illinois and Maryland requiring two years; Connecticut and New Jersey requiring eighteen months; North Carolina, Ohio, South Carolina, Virginia and West Virginia requiring one year; and Louisiana and Vermont requiring six months). *See generally*, Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results in Divorce Reform at the Crossroads in* ECONOMICS OF DIVORCE, COLLECTION OF PAPERS 75 (Law Library 1978) (assessing divorce reform over past twenty years).

[5] *See* N.Y. DOM. REL. LAW §170 (6) (Consol. 2000); *see also* N.Y. DOM. REL. LAW § 200 (Consol. 2000) (giving grounds for judicial separation).

[6] *See* N.Y. DOM. REL. LAW §170 (6) (Consol. 2000).

[7] N.Y. DOM. REL. LAW §170 (Consol. 2000).

[8] N.Y. DOM. REL. LAW §170 (1) - (5) (Consol. 2000).

[9] *See generally* Oliver M. Stone, *Moral Judgment and Material Provision in Divorce*, 3 FAM. L.Q. 371, 371 (1969) (decrying perjury and subterfuge that traditional fault-based divorce proceedings brought into court); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 93 (1991) (stating no-fault laws are aimed at reducing acrimony and stigmatization of parties involved); WEITZMAN, *supra* note 2, at 911 (explaining divorce reform in California and analyzing its consequences for parties involved).

the plaintiff as the "innocent victim."[10]

In 1997, Louisiana became the first state to restore fault-based divorce with the enactment of the Covenant Marriage Act.[11] This created two marriage options in that state, a standard marriage and a covenant marriage.[12] In the standard marriage, a divorce can be obtained by either party petitioning and proving to the court that the parties were living apart and separately for 180 days.[13] However, if married under the covenant marriage law, parties can only be divorced under a fault-based regime, similar to the New York statute.[14] Of more significance, citizens of Louisiana are given the option of choosing which divorce rules control through the type of marriage chosen.[15] A New York domiciliary has no such option and under certain circumstances can be foreclosed by state law from a change of marital status so long as the persons remains a New York domiciliary.

In a line of cases extending from *Griswold v. Connecticut*[16]

[10] *See* Laura Bradford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Law*, 49 STAN. L. REV. 607, 611-13 (1997) (outlining shift in social values fostering judicial policies which place more authority for regulation of family matters on parties themselves); Jacob, *supra* note 2, at 1127 (noting that no-fault divorce was premised on marital failure as symptom of psychological incompatibility and maladjustment rather than as indication of sin). *See generally* Arland Thornton, *Changing Attitudes Toward Separation and Divorce: Causes and Consequences*, 90 AM. J. SOC. 856, 857 (1985) (claiming couples with strong moral objections to divorce are less willing to use separation and divorce to resolve unsatisfactory marriage).

[11] *See* LA. REV. STAT. ANN. §§ 9:224, 9:272 (West 1999) (defining covenant marriages and importance of preserving them). *See generally* Melissa Lawton, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471, 2471 (1998) (analyzing coercive effect of Louisiana's covenant marriage law). *But see* Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1805-07 (1985) (discussing forces in American institutions and culture that have shaped modern family law).

[12] *See* LA. REV. STAT. ANN. § 9:272 (West 2000) (describing covenant marriage and stating its requirements); LA. CIV. CODE ANN. art. 87 (West 2000) (stating requirements for standard marriage); *see also* Witcher v. Witcher, 639 A.2d 1187, 1190 (Pa. Super. Ct. 1994) (holding legislative intent behind Pennsylvania's 1971 reform of Divorce Code to allow no-fault divorce was to "[g]ive primary consideration to the welfare of the family rather than the vindication of private rights or the punishment of matrimonial wrongs"). *See generally* Schneider, *supra* note 11, at 1805-07.

[13] *See* LA. CIV. CODE ANN. art. 102 (West 1999) (specifying one ground for obtaining divorce as living apart and separately for 180 days prior).

[14] *See* LA. REV. STAT. ANN. § 9:307 (2000); N.Y. DOM. REL. LAW § 170 (Consol. 2000); Lawton, *supra* note 11, at 2475 (noting similarities of divorce under Louisiana Covenant Act and New York divorce law).

[15] *See* LA. REV. STAT. ANN. § 9:272 (West 2000) (describing covenant marriage and stating its requirements); LA. CIV. CODE ANN. art. 87 (West 2000) (stating requirements for standard marriage); Lawton, *supra* note 11, at 2475 (noting similarities of divorce under Louisiana Covenant Act and New York divorce law).

[16] 381 U.S. 479, 515-16 (1965) (declaring marriage constitutionally protected).

through *Turner v. Safley*,[17] the Supreme Court has shielded the individual's right to marry and the right to divorce from impermissible encroachment by the state with the protections of substantive due process derived from Fourteenth Amendment. This Note considers whether the New York divorce law that requires fault in contested divorce actions can be found to violate Constitutional law. Part I examines the grounds that must be maintained in a contested New York divorce. This examination will reveal that the outcome of such a contested action may result in a permanent bar to marital dissolution, depriving the plaintiff spouse of a remedy under New York law. In Part II, marital rights will be considered in light of the guarantees afforded by the Fourteenth Amendment of the Constitution. While marriage and divorce are regulated pursuant to state law, which controls this area by a virtual monopoly, the Constitution guarantees that the state may not encroach upon an individual's fundamental rights, which include associational rights, privacy rights and personal freedoms, all of which are implicated in any deprivation of marital status. Part III will show that the New York fault-based divorce law is susceptible to attack as constitutionally unsound as a result of its impingement on these fundamental freedoms. Part IV will put aside the constitutional imperative for the sake of analyzing the justifications offered by so-called women's advocates in defense of this state's divorce law. These justifications will be found specious and alternatives to promote equitable and fair outcomes will be suggested that will also satisfy the Constitutional mandate prohibiting state infringement on individual rights.

I. THE NEW YORK FAULT-BASED DIVORCE LAW

A. The Grounds

To obtain a contested divorce judgment in the New York, the spouse seeking the divorce must prove either a three-year or longer imprisonment of the other spouse[18] or one of three typical

[17] 482 U.S. 78, 95 (1987) (striking down prison regulation which prohibited inmates from marrying, on grounds that it violated Constitutional right to marriage).

[18] *See* N.Y. DOM. REL. LAW §170 (3) (Consol. 2000) (enumerating grounds for which spouse can divorce); *see also* Defeo v. Defeo, 605 N.Y.S.2d 202, 204 (Sup. Ct. 1993)

fault-based grounds: a showing of (1) cruel and inhuman treatment,[19] (2) abandonment[20] or (3) adultery by the contesting spouse.[21]

1. The Ground of Adultery

Until the Divorce Reform Act of 1966, the sole ground for divorce in New York had been adultery.[22] With the new law, adultery continued to be a statutory ground [23] carrying with it both the historical stigma that has attached to it,[24] as well as misdemeanor criminal liability.[25] While the statute no longer contains express provision for penalizing the adulterous spouse in determining spousal maintenance,[26] the court has discretion where there is egregious conduct to reduce spousal maintenance

(holding incarcerated spouse may maintain action for divorce based on abandonment by non-incarcerated spouse).

[19] *See* N.Y. DOM. REL. LAW §170(1) (Consol. 2000); Delliveneri v. Delliveneri, 710 N.Y.S.2d 737, 739 (App. Div. 2000) (granting divorce based upon cruel and inhuman treatment where husband's alcohol abuse, drug abuse, sporadic financial support, and exposure of plaintiff to communicable disease resulted in wife's major surgery and depression).

[20] *See* N.Y. DOM. REL. LAW §170 (2) (Consol. 2000); *Defeo*, 159 Misc. 2d at 493 (allowing husband's divorce action to proceed based on wife's abandonment of incarcerated husband).

[21] N.Y. DOM. REL. LAW §170 (4) (Consol. 2000).

[22] Until the Divorce Reform Act of 1966, adultery was the only ground for divorce in New York for 200 years. [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE 18-3 to18-5 (David J. Lanser & Judith M. Reichler eds., 2001). This left few options to those who sought a divorce because they were abused, abandoned or because they had a functionally dead marriage. *Id.*.Resorting to perjury and to manufacturing charges of adultery was commonplace, as was collusion of parties in fraud perpetrated on the court when divorce was mutually desired. *Id.* For wealthy spouses, migratory divorce could be attained in other jurisdictions. *Id.* In addition to migratory divorces in Nevada or Mexico, another method of evading New York divorce law was through annulment. *See generally* Jacob, *supra* note 2, at 35. There were also fewer stigmas attached to a marriage that was not consummated. *Id.* As a result, New York had the highest annulment rate in nation, with about one-third of all reported annulments in the nation. *Id.*

[23] *See* N.Y. DOM. REL. LAW § 170(4) (Consol. 2000) (expanding definition of adultery to include deviant sexual intercourse); *see also* Freed & Brandes *supra* note 1, at 3 (discussing New York matrimonial law and grounds for divorce).

[24] *See* [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 18-5. Under prior New York statute, persons who were found to have committed adultery that resulted in divorce decree were not permitted to remarry during the plaintiff's lifetime without court permission. *Id.* It was assumed that such persons were deemed unfit to marry. *Id.*

[25] *See* N.Y. PENAL LAW § 255.17 (Consol. 2000) (codifying adultery as Class B misdemeanor).

[26] *See* N.Y. DOM. REL. LAW § 236(A)(1) (West 2001) (providing that "the court may direct either spouse to provide suitably for the support of the other. . ."); [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 18-5; *see also* N.Y. DOM. REL. LAW §236 practice cmt. (McKinney 1999) (Alan D. Scheinkman) (stating before enactment of § 236(A)(1), adultery would automatically bar "women" from receiving alimony).

awards in extremely egregious cases.[27]

When the adultery ground is litigated, the proceeding may become extremely acrimonious, especially when an accusatory spouse sets out to humiliate or embarrass with evidence from detectives, witnesses and photographs.[28] While litigating adultery may afford the plaintiff spouse an upper hand in negotiations,[29] adultery is the most difficult ground to succeed upon because of arcane statutory defenses and arduous evidentiary requirements.[30]

The plaintiff has the burden of proving the inclination and the intent to commit adultery as well as opportunity.[31] Vague testimony as to identification of parties or dates, or incomplete testimony that does not lead to a strong inference of adultery is insufficient.[32] Moreover, where the defendant can make a showing that frequent association with the correspondent was for proper and non-incriminating purposes, the divorce will be dismissed.[33] In cases where it is alleged that defendant is living under the same roof in an adulterous relationship, a strict degree of additional evidence is necessary.[34] Such a living arrangement alone is not sufficient proof of adultery, as it goes to the element of opportunity and not to inclination or intent.[35]

[27] The present provision states that fault is not a factor in equitable distribution. N.Y. DOM. REL. LAW §236(B). However, where the court deems that the fault is egregious, the court can find authority in § 236(B)(6)(a)(11) that states, "any other factor which the court shall expressly find to be just and proper." *Id.* Using this open-ended provision, the court can then reduce spousal maintenance for the adultery. *Id.*

[28] *See* [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 18-6; *see also* WEITZMAN, *supra* note 2, at 8-10.

[29] *See* Weitzman, *supra* note 2, at 9-10 (quoting divorce lawyer Raoul Felder's explanation of use of scandal to get vulnerable executive to settle quickly).

[30] *See* [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 18-6.

[31] *See* Graham v. Graham, 157 A.D. 52, 56, 141 N.Y.S. 766, 768 (App. Div. 1913) (noting that what appears to be improper may be innocent and allegations may be suspect when plaintiff tries to obtain divorce for reasons of his own adultery); [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE *supra* note 22, at 18-21.

[32] *See* [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE *supra* note 22, at 18-27.

[33] *See* Conger v. Conger, 82 N.Y. 603, 603 (1880) (noting that "frequent meetings were proper and for innocent purposes"); Pollack v. Pollack, 71 N.Y. 137, 153 (1877) (explaining that where evidence capable of sustaining two interpretations offered, such as when sole proof tendered is that of opportunity to commit adultery, is not sufficient showing for adultery charge); *Graham* 157 A.D. at 58 (accepting defendant's explanation that she was in barn with correspondent, farmhand, to tend chickens).

[34] *See* [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 18-31 (noting "fairly strict degree of proof" is necessary).

[35] *See* Axtell v. Axtell, 119 N.Y.S. 644, 645 (Sup. Ct. 1909) (finding that living under same roof is only proof of opportunity and not inclination) (dictum); *see also* McGill v. McGill, 77 A.D.2d 892, 432 N.Y.S.2d 1015 (App. Div. 1980) (agreeing with lower court

New York's Civil Practice Law and Rules bar the plaintiff spouse from testifying about the adultery, creating a significant evidentiary burden.[36] Coupled with this evidentiary burden are statutory defenses that can result in dismissal of the action due to plaintiff's conduct.[37] If the plaintiff were also guilty of adultery, such that a divorce would have been granted to the defendant, then the defense of recrimination could be raised that would deny a divorce to the plaintiff.[38] The doctrine of recrimination is based on the premise that a plaintiff who comes to court with "dirty hands" should not be rewarded.[39] Even if adultery is proven, divorce may be denied when the innocent spouse has engaged in condonation.[40]

Condonation, the most commonly raised defense,[41] occurs when the plaintiff has forgiven the defendant for the adultery. This is usually shown by testimony or evidence that the parties, after the known adulterous conduct, have cohabited and engaged in sexual relations.[42] Another defense involves the plaintiff's connivance or procurement in the misconduct, where it can be shown that the plaintiff or the plaintiff's agents actually caused

that "adultery must be based upon clear and convincing evidence and cannot be based on "mere suspicion) (Lazer, J., dissenting). *But see* Westervelt v. Westervelt, 258 N.E.2d 98, 98 (N.Y. 1970) (finding adultery with evidence of living under same roof, social engagements together and taking contraceptive pills).

[36] *See* N.Y. C.P.L.R. § 4502(a) (Consol. 2000) (stating that "husband or wife is not competent to testify against the other in an action founded upon adultery, except to prove the marriage, disprove the adultery, or disprove a defense after evidence has been introduced tending to prove the defense").

[37] *See* N.Y. DOM. REL. LAW § 171 (Consol. 2000); [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 18-77 to 18-78 (noting adultery is only charge in divorce where there are statutory defenses identical to 1837 law).

[38] *See* N.Y. DOM. REL. LAW § 171 (Consol. 2000); Anonymous v. Anonymous, 395 N.Y.S.2d 103 (App. Div. 1977) (citing Recht v. Recht, 36 A.D.2d 939, 940, 321 N.Y.S.2d 395 (App. Div. 1971) (finding mutual recrimination bars divorce based on adultery)).

[39] *See* WEITZMAN, *supra* note 2, at 10-11.

[40] *See* N.Y. DOM. REL. LAW § 171(3) (Consol. 2000).

[41] *See* Weitzman, *supra* note 2, at 10 (describing California's no-fault divorce law). *See generally* Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 28 (1987) (outlining defenses to divorce); Reva B. Seigel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2189 (1994) (discussing right of condonation).

[42] *See* Figurka v. Figurka, 230 N.Y.S.2d 672 (App. Div. 1962) (holding that husband's condonation was evinced from cohabiting in close proximity with wife after knowledge of her adultery); Brown v. Brown, 21 N.Y.S.2d 325, 326 (Dom. Rel. Ct. 1940) (stating as axiomatic that resumption of marital relationship after adulterous breach is condonation barring divorce). *See generally* J. Herbie DiFonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 IDAHO L. REV. 1, 7 (1997) (describing parameters of condonation defense).

or committed the adultery.[43] Additionally the action could be barred by the five-year statute of limitations.[44] Because of the acrimonious nature of an adultery proceedings and the legal difficulties posed by the defenses and evidentiary burdens, often times multiple grounds are pled, in conjunction with an adultery charge.[45]

2. The Ground of Cruel and Inhuman Treatment

Under New York Domestic Relation Law § 170 (1), a divorce will be granted where the defendant's conduct is found to have adverse consequences on the plaintiff.[46] The plaintiff must prove that the other spouse's conduct "so endangers the physical or mental well being of the plaintiff so as to render it unsafe or improper for the plaintiff to cohabit with the defendant."[47] This definition and what rises to the level of cruel and inhuman treatment has been the subject of much judicial controversy.[48] In order to maintain the action, the plaintiff in a long-term marriage must show serious misconduct and not mere incompatibility.[49] Moreover, a high degree of proof is required to show that there is actionable cruelty, usually corroboration by medical experts or third parties,[50] especially in the case of a long-

[43] *See* N.Y. DOM. REL. LAW § 171(1) (Consol. 2000); Beauley v. Beauley, 190 N.Y.S. 129, 130-31 (Sup. Ct. 1921) (explaining that divorce decree must be set aside when procured by deceit); Armstrong v. Armstrong, 92 N.Y.S. 165 (Sup. Ct. 1904) (denying divorce because of plaintiff's connivance and procurement of adultery).

[44] *See* N.Y. DOM. REL. LAW § 210 (Consol. 2000).

[45] *See* [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 18-6.

[46] *See* N.Y. DOM. REL. LAW § 170(1) (Consol. 2000); *see also* Herbert Jacob, *supra* note 2, at 1130 (1988) (noting that New York did not amend its divorce law before Civil War to include this ground as most other states had done).

[47] N.Y. DOM. REL. LAW § 170(1).

[48] *See* [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 16-41.

[49] *See* Brady v. Brady, 476 N.E.2d 290 (N.Y. 1985) (reiterating *Hessen* rule requiring proof of cruel and inhuman treatment to establish repeated conduct that makes cohabitation unsafe or improper, noting that irreconcilable or irremediable differences is insufficient); Hessen v. Hessen, 308 N.E.2d 891 (N.Y. 1974) (distinguishing cruel and inhuman treatment from mere incompatibility, which is not ground for divorce); *see also* Murphy v. Murphy, 683 N.Y.S.2d 650, 651 (App. Div. 1999) (finding allegations of spouse's frequent absence, verbal abuse and two altercations without physical injury insufficient to show course of conduct of cruelty in 26 year marriage); Biegeleisen v. Biegeleisen, 676 N.Y.S.2d 684, 685 (App. Div. 1998) (finding strained, tense and unpleasant relationship after 20 year marriage did not establish harmful effects on wife). *See generally*, Joel R. Brandes, *'Hessen' Revisited - The Cruelty Ground for Divorce*, N.Y.L.J., Jan. 25, 2000, at 3 (discussing cases that shed light on cruelty ground for divorce).

[50] *See* Marciano v. Marciano, 555 N.Y.S.2d 518 (App. Div. 1990) (reversing grant of divorce where no medical proof for causation provided for condition); Green v. Green, 513

term marriage.[51] Insufficient evidence can lead to dismissal for failure to state a cause of action.[52] In a long term marriage, discord and friction between the spouses is often not enough to sustain a divorce,[53] unless physical abuse is involved.[54] The amount of physical abuse necessary to obtain a divorce is not clearly defined.[55] An isolated act of violence may or may not be

N.Y.S.2d 49, 49 (App. Div. 1987) (finding error in granting divorce where no medical evidence showed wife's health was affected by misconduct). *Cf.* Wilbourne v. Wilbourne, 569 N.Y.S.2d 680, 680 (App. Div. 1991) (finding corroboration for wife's constant accusations of infidelity as basis for impropriety for continued cohabitation); McKilligan v. McKilligan, 550 N.Y.S.2d 121, 121 (App. Div. 1989) (finding cruelty that impaired spouse using corroboration of family, medical experts and third parties).

[51] *See Brady*, 64 N.Y.2d at 345 (reaffirming *Hessen*, holding whether plaintiff has cause of action for cruelty divorce will depend, in part, on duration of marriage in issue); Doyle v. Doyle, 625 N.Y.S.2d 693, 694 (App. Div. 1995) (stating that lack of objective proof that defendant's misconduct adversely affected plaintiff's health was ground for reversing divorce decree); [1 Matrimonial Actions] NEW YORK CIVIL Practice, *supra* note 22, at 15-40; *see also* Wilkins v. Wilkins, 458 N.Y.S.2d 3, 4 (App. Div. 1982) (stating that high degree of proof is required to terminate marriage of relatively long duration on grounds of cruel and inhuman treatment).

[52] *See* Waterman v. Waterman, 490 N.Y.S.2d 436, 438 (Sup. Ct. 1985) (dismissing action for failure to state cause of action where cruel and inhuman treatment was alleged by defendant's silent treatment, name calling and slight physical contact); *see also Wilkins*, 91 A.D.2d at 771 (noting failure to converse or communicate does not rise to level of cause of action for divorce on ground of cruel and inhuman treatment); Concetto v. Concetto, 377 N.Y.S.2d 164, 165 (App. Div. 1975) (stating that name-calling and two isolated acts of alleged violence failed to suffice for finding cruel and inhuman treatment). *Cf.* Echevarria v. Echevarria, 353 N.E.2d 565, 566 (N.Y. 1976) (stating that even one beating constitutes more than single act of violence when it is composed of repeated and prolonged acts of physical abuse); *Bulger*, 88 A.D.2d at 895 (noting plaintiff need not establish actual physical injury at hands of defendant or specific number of instances of physical abuse and that pattern of conduct including verbal abuse and physical harassment is sufficient).

[53] *See* [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 15-19 to 15-21 (citing case of Jacoby v. Jacoby, which denied divorce in 25 year marriage where violent verbal attacks occurred but no unprovoked physical injury); *see also Hessen*, 33 N.Y.2d at 410 (stating that marital misconduct must be distinguished from mere incompatibility to constitute cruel and inhuman treatment); Buckley v. Buckley, 461 N.Y.S.2d 619, 620 (App. Div. 1983) (noting inordinate weight gain and high blood pressure do not constitute cruel and inhuman treatment); Denny v. Denny, 409 N.Y.S.2d 443, 444 (App. Div. 1978) (stating that Domestic Relations Law does not authorize granting divorce based on irreconcilable differences or incompatibility), *aff'd*, 48 N.Y.2d 915 (1979). *But see* Wilbourne v. Wilbourne, 569 N.Y.S.2d 680, 680 (App. Div. 1991) (finding scratching and hair-pulling as marital discord that went beyond incompatibility or strained relations).

[54] *See* Zack v. Zack, 590 N.Y.S.2d 632, 634 (App. Div. 1992) (finding actionable cruelty in pattern of abusive acts, including causing wife's nipples to bleed, smashing her hand in a kitchen drawer and punching her in head); Frigano v. Frigano, 339 N.Y.S.2d 533, 534 (Sup. Ct. 1972) (granting divorce where husband struck or choked wife on at least four occasions). *But see* Johnson v. Johnson, 351 N.Y.S.2d 347, 348 (App. Div. 1974) (holding that single act of violence is not sufficient to warrant divorce for cruel and inhuman treatment).

[55] *See* [Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 15-25; *see also Concetto*, 50 A.D.2d at 883 (stating that name-calling and two isolated acts of alleged violence failed to suffice for finding of cruel and inhuman treatment); Mante v. Mante, 34 A.D.2d 134, 136, 309 N.Y.S.2d 944, 947 (App. Div. 1970) (noting that cruel and inhuman

held sufficient to grant a divorce.[56] In a short marriage, lasting four years or less, the New York Court of Appeals has held that two beatings did not constitute "mere incompatibility," and stated that a single beating could constitute more than "a single act of violence when it is composed of repeated and prolonged acts of physical abuse."[57] On the other hand, an isolated violent act coupled with other misconduct may be considered sufficient.[58] Adulterous conduct, especially if open and notorious, may also be accepted as proof of cruel and inhuman treatment.[59] Thus, one commentator has noted that "the action is fraught with speculation as to the type of conduct which can be held sufficient to grant affirmative relief."[60]

While the degree of proof is a serious obstacle to obtaining a

treatment is an ad-hoc determination).

[56] *See* Matthews v. Matthews, 238 A.D.2d 926, 926, 661 N.Y.S.2d 115, 115 (App. Div. 1997) (holding absence of cruel and inhuman treatment in case of one incident of physical abuse in fourteen year marriage); Wenderlich v. Wenderlich, 311 N.Y.S.2d 797, 797 (App.Div.1970) (finding wife not entitled to divorce as result of husband striking her once); Schapiro v. Schapiro, 276 N.Y.S.2d 678, 679 (App. Div. 1967) (holding absence of cruel and inhuman treatment in case of two isolated incidents of physical abuse). *See generally* [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 15-25 (noting change in law in 1966 deeming single act of violence insufficient to establish cruel and inhuman treatment overruled preceding well-settled rule).

[57] *See* Echevarria, 353 N.E.2d at 566 (stating that one beating constitutes more than single act of violence when it is composed of repeated and prolonged acts of physical abuse); *see also* Bulger v. Bulger, 450 N.Y.S.2d 601, 601 (App. Div. 1982) (noting that plaintiff need not establish actual physical injury at hands of defendant, but that pattern verbal abuse and physical harassment is sufficient); Barnier v. Barnier, 349 N.Y.S.2d 113, 113 (App. Div. 1973) (holding that humiliation, denying sexual attention, and neglect are sufficient to sustain action for divorce for cruel and inhuman treatment).

[58] *See Echevarria,* 40 N.Y.2d at 264 (stating that even one beating constitutes more than single act of violence when it is composed of repeated and prolonged acts of physical abuse); Johnson v. Johnson, 325 N.E.2d 167 (N.Y. 1975) (upholding, without explanation, granting of divorce for husband's single violent act coupled with pattern of bickering and harassment); *see also* Weilert v. Weilert, 495 N.Y.S.2d 707, 708 (App. Div. 1985), *rev'd on other grounds*, 562 N.Y.S.2d 139 (App. Div. 1990) (finding ample cruelty where husband verbally abused wife for two years and struck her and child once while intoxicated). *Cf. Wenderlich*, 34 A.D.2d at 727 (finding wife not entitled to divorce as result of husband striking her once).

[59] *See* Grubman v. Grubman, 548 N.Y.S.2d 457, 458 (App. Div. 1989) (finding each spouse had established prima facie case for cruel and inhuman conduct). *Cf.* Silverman v. Silverman, 632 N.Y.S.2d 393, 396 (Sup. Ct. 1995) (stating that claim of adultery is fundamentally different in character from claim of cruelty). *See generally* Christian v. Christian, 365 N.E.2d 849, 853 (N.Y. 1977) (discussing that under Divorce Reform Law of 1966, adultery is one of many factors that may constitute cruel and inhuman treatment in New York courts). *Cf.* Silverman v. Silverman, 632 N.Y.S.2d 393, 396 (Sup. Ct. 1995) (stating that claim of adultery is fundamentally different in character from claim of cruelty).

[60] [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 16-06. *See generally id.* at 16.04 (discussing variations of conduct in divorce and separation situations); *Id.* at 18.09 to 18-13 (discussing how statute of limitations on adulterous conduct will vary, affecting relief sought).

divorce for cruel and inhuman treatment, especially for a long-term marriage, the divorce may also be thwarted by the defense of provocation.[61] Following the "clean hands" doctrine, the court requires that the party seeking the divorce be blameless.[62] Another defense may be raised when the "innocent" spouse has continued cohabitation following acts of cruelty,[63] following a rationale similar to that of the condonation defense for adultery.[64]

3. The Ground of Abandonment

Although a ground for separation since 1813, abandonment was added as a ground for divorce in 1966.[65] Abandonment is generally defined as (1) willful and voluntary leaving of the marital home, (2) without justification and (3) with the intention of never returning.[66] A waiting period of one year before commencement of the divorce action is required.[67]

If there is consent from the other or an agreement to separate, by definition there is no abandonment.[68] The abandonment must

[61] *See* Melnick v. Melnick, 538 N.Y.S.2d 441, 443 (App. Div. 1989) (upholding jury denial of divorce for wife's misconduct of throwing objects and garbage at husband because husband provoked wife by telling her he was dating another woman).

[62] *See* Mante v. Mante, 309 N.Y.S.2d 944, 949-950 (App. Div. 1970) (stating although wife was entitled to divorce on basis of cruel and inhuman treatment, her misconduct of abandonment caused forfeiture of her right to divorce); *see also* Rect v. Rect, 321 N.Y.S.2d 395, 396 (App. Div. 1971) (denying divorce to either party due to guilty activities by both parties); Defeo v. Defeo, 605 N.Y.S.2d 202, 203 (Sup. Ct. 1993) (finding that plaintiff was blameless when wife's conduct constituted abandonment and justified divorce); WEITZMAN, *supra* note 2, at 11 (focusing that factors of fault and guilt are not required in determining California no-fault divorce).

[63] *See* Warguleski v. Warguleski, 435 N.Y.S.2d 857, 858 (App. Div. 1981) (denying divorce where acts complained were followed by cohabitation); *see also* Brady v. Brady, 101 N.Y.S.2d 470, 472 (App. Div. 1984) (stating that cohabitation factors into divorce analysis), *aff'd* 64 N.Y.2d 339 (1985).

[64] *See* WEITZMAN, *supra* note 2, at 10 (discussing defenses for divorce and adultery). *See generally* Bracksmayer v. Bracksmayer, 22 N.Y.S.2d 110, 112 (Sup. Ct. 1940) (defining cohabitation and discussing condonation in divorce context).

[65] *See* N.Y. DOM. REL. LAW § 170(2) (Consol. 2000); Joint Legislative Comm. On Matrimonial and Family Law, No. 8, at 87 (N.Y. 1966).

[66] *See* N.Y. DOM. REL. LAW §170 (Consol. 2000) (adopting wording from *Williams v. Williams*, 29 N.E. 98, 98 (N.Y. 1891) (defining abandonment in separation action); *see also* Hage v. Hage, 492 N.Y.S.2d 172, 175 (App. Div. 1985) (requiring that abandoned spouse be firmly resolved not to live with other spouse and not to fulfill marital obligations for at least one year, with such conduct being unjustified and without consent of abandoned spouse); Harmen v. Harmen, 209 N.Y.S.2d 568, 569-70 (App. Div. 1961) (requiring that action for abandonment state sufficient facts to establish willful abandonment, that defendant left with intention not to return, and that times and places of acts of abandonment be specified).

[67] N.Y. DOM. REL. LAW § 170(5) (Consol. 2000).

[68] *See* Belandres v. Belandres, 395 N.Y.S.2d 458, 459 (App. Div. 1977) (holding award

be willful and voluntary.[69] The essential element of permanence of the abandonment is a fact specific determination, requiring the court to carefully scrutinize the circumstances and conduct of the parties.[70] For the abandonment ground to succeed, there must be no justification for the permanent leave-taking.[71] This requirement is a vestigial remnant from New York's action for separation, and is based on the same legislative concerns that the wife will employ the abandonment action as an extortion tactic.[72] Although specifically formulated for this select set of facts, the rule remains, and the finding of misconduct by the plaintiff or justification for the departure will bar a divorce.[73]

Where physical violence is a justification for the abandonment, the burden required is not as stringent as those required for

of dual divorce on mutual abandonment ground improper); Rosenbaum v. Rosenbaum, 288 N.Y.S.2d 285, 289 (Sup. Ct. 1968) (stating that court ordered separation does not constitute abandonment).

[69] *See* N.Y. DOM. REL. LAW § 170(2) (Consol. 2000) (stating that action for divorce may be maintained on grounds of abandonment of plaintiff by defendant for period of one or more years); *see also Harmen*, 12 A.D.2d at 784 (stating action for separation based on abandonment complaint must state facts sufficient to establish that abandonment was willful with no intention of returning).

[70] *See* Mirizio v Mirizio, 161 N.E. 461, 462 (N.Y. 1928) (refusing to create formula to establish permanent abandonment, although recognizing time is often most significant factor); *see also* In re Smiley, 330 N.E.2d 53, 64 (N.Y. 1975) (Fuchsberg, J., dissenting) (stating that parties must abide by technical requirements of proof if seeking to obtain divorce based upon abandonment); Graves v. Graves, 675 N.Y.S.2d 843, 845 (Sup. Ct. 1998) (holding no cause of action for divorce based upon husband's abandonment of wife where order of protection has removed him from marital home).

[71] *See* Pike v. Pike, 19 N.Y.S.2d 711, 712 (Sup. Ct. 1940) (finding justification because of wife's assaults on husband).

[72] The Joint Committee retained the no-justification requirement despite dissatisfactions with it so as to preclude a wife from "perversely" using the abandonment action in an attempt to hamstring the husband-defendant who has sought a migratory divorce. *See* Joint Legislative Comm. On Matrimonial and Family Law, No. 8, at 96 (N.Y. 1966).The plaintiff's burden to prove that the leave-taking was unjustified was left as protection for the husband who otherwise would have been prey to what the legislature viewed as extortion by the wife:

The wife then, in effect, extorts ransom from the husband in the form of a property settlement or excessive alimony before she consents to the arrangement of a migratory divorce. It has been forcefully argued that Section 202at least offers the husband a practical defense which would often discourage avaricious wives from undertaking such perversions of the separation action. For this reason, the Committee, with some reluctance proposes retention of Section 202 for the present . . . . *Id.*

[73] *See* Johnson v. Johnson, 561 N.Y.S.2d 1018, 1018 (App. Div. 1990) (holding that husband's claim of abandonment was invalid as plaintiff-husband had been in prison during period of abandonment); Walden v. Walden, 41 A.D.2d 664, 664, 340 N.Y.S.2d 709, 709 (App. Div. 1973) (finding it was error to preclude evidence of adultery as defense to abandonment). *See generally* Lisa E. Martin, *Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's Right to Counsel*, 34 GONZ. L. REV. 329, 346 (1999) (noting that any misconduct by plaintiff may not only render divorce proceedings more difficult, but may also bar custody rights as well).

maintaining a charge of cruel and inhuman treatment.[74] Thus, it appears easier to justify abandonment caused by violence, which would bar the grant of a divorce, than it would be to grant a divorce based on cruel and inhuman treatment.[75]

In 1960 the Court of Appeals enlarged the ground of abandonment in *Diemer v. Diermer*[76] by finding the unjustified refusal of a spouse to have conjugal relations for one year gave rise to a cause of action in abandonment.[77] This enlargement however, did not open the "floodgates to actions" in abandonment as feared.[78] The courts require that sexual abandonment be "unjustified, willful and continued" and that the allegedly abandoned spouse repeatedly request the other spouse for cohabitation.[79] The courts have not granted divorce for abandonment where it was shown that the abandonment was due to misconduct by the other spouse.[80] The courts, moreover, have required that the evidence of unjustified refusal be specific.[81] Additionally, a divorce based on lack of conjugal

[74] *See* [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 16-41 (discussing the difficulty for proving cruel and inhuman treatment in divorce proceedings).

[75] *See* [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 16-41.

[76] 8 N.Y.2d at 206 (1960).

[77] *See id.*; *see also* Silver v. Silver, 253 A.D.2d 756, 757 (N.Y. App. Div. 1998) (granting divorce to husband after showing of willful and unjustified refusals by wife to have sex for one year period).

[78] *See* [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 16-36 (noting that while divorce for abandonment was not available in 1966, statute did allow for separation action on same ground and divorce action became patterned on earlier cases for separation).

[79] *See* Biegeleisen v. Biegeleisen, 676 N.Y.S.2d 684, 695 (App. Div. 1998) (denying divorce as there was no showing of repeated requests for sexual relations); Lyons v. Lyons, 589 N.Y.S.2d 557, 558 (App. Div. 1992) (requiring abandoning spouse to unjustifiably refuse to have sex for at least one year); Caprise v. Caprise, 533 N.Y.S.2d 622, 624 (App. Div. 1988) (requiring repeated requests for sexual relations by abandoned spouse for proof of abandonment); Nicholson v. Nicholson, 449 N.Y.S.2d 4, 4 (App. Div. 1982) (upholding dismissal of action where request for sex was made only once in seven years); Rossiter v. Rossiter, 399 N.Y.S.2d 596, 597 (Sup Ct. 1977) (finding failure to have conjugal relations insufficient to sustain cause of action without unjustified refusal); [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 16-36 (noting that courts have strictly enforced requirement that refusal must be unjustified).

[80] *See* Schine v. Schine, 286 N.E.2d 449, 452 (N.Y. 1972) (stating that abandonment must be unjustified and without consent of other spouse); *see also* Passantino v. Passantino, 450 N.Y.S.2d 98, 99 (App. Div.1982) (denying husband's divorce action based on sexual abandonment due to husband's extra-marital relations). *See generally* Lyons v Lyons, 589 N.Y.S.2d 557, 558 (App. Div. 1992) (stating that in order to establish constructive abandonment, spouse must prove that abandoning spouse unjustifiably refused to fulfill basic obligations arising from marriage contract for at least one year).

[81] *See* N.Y. DOM. REL. LAW § 170(2) (Consol. 2000) (stating action for divorce may be procured for abandonment for at least one year); *Schine*, 31 N.Y.2d at 119 (stating abandonment must be unjustified and without consent).

relations will not be granted where the plaintiff spouse has acquiesced to a sexless marriage because there has been no act of abandonment.[82]

B. Domestic Relations Law Section 170 May Result in Permanent Bar to an Interstate Divorce

The stringency of both the proofs required for the elements of each ground for divorce and the ease with which defenses can defeat these grounds make it difficult, and in some cases impossible, to overcome the fault requirement in a contested divorce.[83] Therefore, it is entirely possible that a New York citizen wishing to dissolve a marriage may never be able to obtain a divorce from the contesting spouse[84] so long as the contesting spouse remains fixed in opposing the divorce and so long as the plaintiff remains a citizen of New York.

As a result of the State's refusal to alter the marital status of the parties, the plaintiff, unable to obtain a divorce, is thereby forced into a dilemma.[85] Due to the bigamy laws,[86] he or she is barred from entering a new marriage and as a result may

[82] *See* Frances G. v. Vincent G., 525 N.E.2d 739, 740 (N.Y. 1988); *Schine*, 31 N.Y.2d at 119 (inferring that sexless marriage is not constructive abandonment if consensual); Solomen v. Solomen, 49 N.E.2d 470, 471 (N.Y. 1943) (stating that consensual repudiations of marital obligations is not abandonment unless there is good faith renewal of marital obligations).

[83] *See, e.g.*, Beigeleisen v. Beigeleisen, 676 N.Y.S.2d 684, 684 (stating wife seeking divorce under "cruel and inhuman treatment" failed to show serious misconduct and therefore failed to procure divorce); Wenderlich v. Wenderlich, 311 N.Y.S.2d 797, 797 (App. Div. 1970) (stating that striking plaintiff was insufficient to establish cruel and inhuman treatment); McGill v. McGill, 432 N.Y.S.2d 1015, 1016 (App. Div. 1980) (stating adultery must be proven through clear and convincing evidence, where living and vacationing together is insufficient to prove adultery).

[84] *See e.g.*, Zweig v. Zweig, 580 A.2d 939, 941 (Vt. 1990) (stating that divorce action would not be barred due to prior divorce proceeding in sister state if subsequent action is based on events subsequent to prior action). *Compare* Gordon v. Gordon, 59 So. 2d 40, 43-44 (Fla. 1952) (following jurisdictions that hold subsequent divorce action in sister state will not be barred regarding same facts if different cause of action asserted), *with* Ball v. Ball, 76 S.W.2d 71, 72 (Ark. 1934) (stating that final decree in divorce action in sister state should apply as bar to subsequent action as to all causes of action which could have arisen from same facts and circumstances).""

[85] *See generally* N.Y. DOM. REL. LAW §§ 170, 170-a, 171 to 173, 175 (Consol. 2001) (codifying actions for divorce); Herbert Jacob, *supra* note 2, at 1104 (enunciating three reasons for divorce law reform); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 91-97 (1991) (stating four reasons for impetus in divorce law reform).

[86] N.Y. PENAL LAW § 255.15 (Consol. 2000) (codifying law against bigamy). *See, e.g.*, N.J. STAT. ANN. § 2C:24-1 (West 2000) (New Jersey's law against bigamy); R.I. GEN. LAWS § 11-6-1 (2001) (Rhode Island's law against bigamy).

abandon the contesting spouse or commit adultery.[87] This result is the very misconduct deemed culpable by the law, yet for which the law offers no remedy when there is a contesting spouse.[88] Furthermore, where abandonment does not result, the law creates a situation fraught with the danger of domestic violence, where the antagonistic spouses, pitted against one another in an adversarial proceeding, continue to cohabitate.[89]

II. CONSTITUTIONAL PROTECTIONS FOR THE RIGHT TO MARRY AND THE CONCOMITANT RIGHT TO DIVORCE

A. Marital Status as Subsumed by Personal Autonomy and the Right to Privacy

The right to marry has been associated with the Constitution's broad grant of personal autonomy for which there is a grant of presumptive immunity from governmental regulation.[90] Justice Harlan first articulated this concept in the United States Supreme Court in 1961 in the dissent in *Poe v. Ullman*,[91] where he recognized the right of citizens to be free of arbitrary government intrusion in their private affairs.[92] A precursor of

[87] *See* N.Y. DOM. REL. LAW § 6 (Consol. 2000) (providing that marriage between previously married persons are void unless dissolved or annulled); *see also* Cave v. Cave, 137 N.Y.S.2d 857, 858 (App. Div. 1955) (stating that marriage is void if contracted by person whose spouse is living, unless previous marriage has been annulled or dissolved); Stein v. Dunne, 103 N.Y.S. 894 (App. Div. 1907) (stating that second marriage is void where first marriage has not been dissolved or annulled even with absence of judicial decree), *affirmed* 190 N.Y. 524, (1907). *See generally* N.Y. PENAL LAW § 255.15 (Consol. 2000) (codifying criminal act of bigamy).

[88] *See Cave*, 285 A.D. at 450; *see also supra* nn. 1-10 & accompanying text.

[89] *See* Marther Heller, Note, *Should Breaking Up Be Harder To Do?: The Ramifications a Return to Fault-Based Divorce Would Have Upon Domestic Violence*, 4 VA. J. SOC. POL'Y & L. 263, 266-68 (1996) (arguing that return to fault basis would adversely affect abused women). *See generally* Martha R. Mahoney, *Legal Images of Battered Women Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5-8 (1991) (discussing patterns of abuse for women who attempt to separate from their spouses and significant others). *But cf.* Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 879, 890-91 (1994) (stating that states where no-fault divorce is available do not necessarily have lower instances of domestic violence).

[90] *See generally* Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 447 (1983) (discussing origins of right to personal autonomy); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1419 (1974) (discussing synthesis of constitutionally guaranteed right to privacy); Paul M. Adkins, Note, *Omnipotent or Impotent? The Curator's Role in Separation and Divorce*, 43 LA. L. REV. 1019, 1023-29 (1983) (discussing Constitutional right to marry).

[91] 367 U.S. 497 (1961).

[92] *See id.*, at 535-55 (Harlan, J., dissenting) (arguing view that marital privacy was

the Harlan articulation was the 1942 Supreme Court ruling in *Skinner v. Oklahoma*,[93] where the Court recognized the basic rights of marriage and procreation and found the state's sterilization of a criminal population a violation of the equal protection guarantees of the Fourteenth Amendment.[94] In *Loving v. Virginia*,[95] the Court held that a state miscegenation statute was unconstitutional, noting that "the freedom to marry has been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[96]

1. The Right to Marry

It was the landmark case of *Griswold v. Connecticut*,[97] which firmly established the the right to marital privacy in the Fourteenth Amendment,[98] through the resurrection of the doctrine of Substantive Due Process,[99] where the rights of a married couple in matters of procreation and family were protected from impermissible state encroachments.[100] *Eisenstadt*

guaranteed by Fourteenth Amendment liberty and that intrusion of personal privacy by state required careful scrutiny). *See generally* Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting) (arguing every man, as against government, has right to be let alone); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-36 (1925) (recognizing rights of parents to be free from arbitrary intrusions by government in child rearing).

93 316 U.S. 535 (1942).

94 *See id.*, at 541-43 (recognizing marriage as fundamental to human existence and survival). *See generally* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (emphasizing recognition by Fourteenth Amendment of right to marry).

95 388 U.S. 1 (1967)

96 *See id.*, at 12 (recognizing freedom to marry as constitutionally protected right, essential to life, liberty, and pursuit of happiness).

97 381 U.S. 479 (1965).

98 *See id.* at 493 (Goldberg, J., concurring) (recognizing Fourteenth Amendment prohibits states from abridging personal liberties not listed in first eight amendments); *Id.* at 500 (Harlan, J., concurring) (recognizing the Fourteenth Amendment is not limited to protection of rights listed in Constitution); *Id.* at 503 (White, J., concurring) (noting anti-use statute invades protected area of privacy). *See generally* Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (recognizing freedom of personal choice is protected by Due Process clause of Fourteenth Amendment); Lawton, *supra* note 87, at 2481-88 (discussing origins of Constitutional right to marry).

99 *See Griswold*, 381 U.S. at 482-84 (distinguishing *Lochner* era use of doctrine to support freedom to contract from this new use of substantive due process for privacy). *See generally Moore*, 431 U.S. at 499 (recognizing that freedom of choice in area of marriage is protected by Due Process Clause); *Developments, the Constitution of the Family*, *supra* note 16, at 1161-97 (discussing fundamental right to autonomy in areas of marriage); Lawton, *supra* note 87, at 2481-88 (discussing Fourteenth Amendment as origin to Constitutional right to marry).

100 *See Griswold*, 381 U.S. at 486 (affording heightened judicial protection from state interference for marital privacy); *see also Developments, the Constitution of the Family*, *supra* note 16, at 1161-87 (outlining Court's progressive adoption of substantive due process to protect fundamental rights, using procreative rights as illustration). *See*

v. Baird[101] extended the privacy right enunciated for married couples in *Griswold* to that of the individual.[102] The monumental decision of *Roe v. Wade*[103] rendering state prohibition against abortion unconstitutional,[104] was a natural consequence of the premise of procreative autonomy set down in the seminal decisions of *Griswold* and *Eisenstadt*.[105] The Supreme Court jurisprudence protective of individual's right to autonomy and personal freedom was forged by the trilogy— of *Griswold*, *Eisenstadt* and *Roe*,[106]— and gave rise to the jurisprudence of decisional autonomy that accorded the individual the right to be free of state intrusion in matters affecting personal and family choices.[107]

In *Zablocki v. Redhail*,[108] decided in 1978, the Supreme Court aggressively enlarged the scope of privacy rights to include an

generally Palko v. Connecticut, 302 U.S. 319, 323 (1937) (asserting Constitutional protection of fundamental rights from government encroachment).

101 405 U.S. 438 (1972).

102 *See id.* at 453-54 (proclaiming that right of procreative autonomy defined in *Griswold* was right of individual, whether married or not); *Developments, The Constitution of the Family*, *supra* note 16, at 1184-85 (discussing how *Eisenstadt* decision goes beyond *Griswold* rationale); *see also* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) (recognizing that Constitutional protection of personal decisions extends to individuals).

103 410 U.S. 113 (1973).

104 *See id.* (rendering state prohibition against abortion illegal).

105 *See Developments, The Constitution of the Family*, *supra* note 16, at 1185 (stating that inquiry in *Roe v. Wade* naturally followed established right of procreative autonomy); *see also* David B. Cruz, *"The Sexual Freedom Cases"? Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 311 (2000) (stating that right of procreative autonomy was extended to abortion in *Roe v. Wade*); Martin Rhonheimer, *Fundamental Rights, Moral Law, and the Legal Defense of Life in a Constitutional Democracy: A Constitutionalist Approach to the Encyclical Evangelium Vitae*, 43 AM. J. JURIS. 135, 157 (1998) (suggesting that *Roe v. Wade* outcome is related to *Eisenstadt* and *Griswold*).

106 *See* Jane Biondi, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 621-22 (1999) (analyzing impact of these three cases on protection of individual rights); *see also* Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 357 (1997) (noting these cases as responsible for judicial acceptance of individuality and choice in family matters). *See generally Developments, The Constitution of the Family*, *supra* note16, at 1161-97 (discussing sources of Constitutional protection for family rights).

107 *See* Carey v. Population Serv. Int'l, 431 U.S. 678, 685 (1977) (stating "the decision that an individual may make without unjustified governmental interference are personal decisions 'relating to marriage. . . .'" (quoting Roe v. Wade, 410 U.S. 113, 152 (1973))). *See generally* Biondi, *supra* note 104, at 621-22 (discussing individual rights argument in support of fault-based divorce). *But see* David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 536 (2000) (questioning aggressive posture of Court in cases involving state intrusion upon family rights).

108 434 U.S. 374 (1978).

individual's right to marry.[109] *Zablocki* struck down as unconstitutional a Wisconsin law that prior to obtaining a marriage license, permission from the state was needed based on a showing that prior support obligations were complied with and proof that his premarital children would not become public charges.[110] The Court affirmed the right to marry as fundamental, and stated that the Court had "routinely categorized the decision to marry as among the personal decisions protected by the right of privacy."[111] Moreover, the state law was deemed a "serious intrusion" on the right to marry as some were "absolutely prevented from getting married" by the law, while others were effectively "coerced into forgoing their right to marry."[112]

Turner v. Safley[113] solidified the *Zablocki* court's designation of Constitutional status to the right to marry[114] and held that *Zablocki* applied to prison inmates.[115] Under Missouri law, marriage between prison inmates was almost completely prohibited.[116] As the regulation was not reasonably related to

[109] *See id.* (holding that statute violated Equal Protection Clause by interfering with exercise of fundamental right to marry).

[110] *See id.* at 386. *See generally* M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (noting close consideration Court gives to important family issues); Meyer, *supra* note 107, at 532 (stating that current Constitutional protection for family privacy includes right to marry).

[111] *See Zablocki*, 434 U.S. at 387; Dolgin, *supra* note 106, at 357 (noting U.S. Supreme Court cases responsible for judicial acceptance of individuality and choice in family matters); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1510-11 (1992) (discussing Supreme Court's changing treatment of marriage).

[112] *See Zablocki*, 434 U.S. at 384; *see also* Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 399 (2000) (stating that privacy protects right to marry); Lynn D. Wardle, *Loving v. Virginia and The Constitutional Right To Marry, 1790-1990,* 41 HOW. L.J. 289, 339 (1998) (stating that right to marry is critical component of privacy).

[113] 482 U.S. 78 (1987).

[114] *See id.*, at 95 (stating that prison inmates "retains those [Constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. . ."); *Zablocki*, 434 U.S. at 387; *Id.* at 375 n.1 (providing pertinent parts of Wisconsin statute which failed to recognize foreign marriages for which state permission was not sought, invalidated marriages not in statutory compliance and criminally penalized non-compliance). *See generally* WIS. STAT. § 245.10(1), (4), (5) (1999).

[115] *See Turner*, 482 U.S. at 78 (1987) (holding that Missouri prison restrictions on inmate correspondence violated Constitutional right to marry).

[116] *Id.*; *see also* Maltz, *supra* note 16, at 951 (stating *Turner* further enhanced Constitutional status of right to marry); Mark C. Rahdert, *Same Sex Relationships: A Constitutional Commentary*, 7 TEMP. POL. & CIV. RTS. L. REV. 495, 501 (1998) (noting *Turner* followed and built on *Zablocki* in upholding prisoners' Constitutional right to marry); Jennifer Wriggins, *Maine's Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages: Questions of Constitutionality Under State and Federal Law*, 50 ME. L. REV. 345, 360 (1998) (noting *Loving v. Virginia*, *Zablocki* and *Turner* established

penological interests and the fundamental right to marry was impermissibly burdened, the court struck the law down as unconstitutional.[117]

2. The Right to Divorce

As *Zablocki* and *Turner* make it improper for state law to unduly burden the fundamental right to marry, it appears logical to extend this Constitutional dictate to a state divorce law, such as New York's, that also unduly burdens the right to marry by making divorce decrees unattainable in a contested divorce under many circumstances.[118]

In *Boddie v. Connecticut*,[119] the Supreme Court noted how singularly important the judicial system is in regard to martial relations: "Without prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we unaware of any jurisdiction where private citizens may covenant to dissolve marriages without state approval."[120] In *Boddie*, an indigent was barred from getting a divorce because he could not pay the filing fees.[121] The Court found state denial of access a violation of due process rights and struck down the statute.[122] Because of the importance of marriage in our society, the court found that the state monopoly of divorce made it

right to marry as fundamental); Sherri L. Toussaint, Comment, *Defense of Marriage Act: Isn't It Ironic. . .Don't You Think? A Little Too Ironic?*, 76 NEB. L. REV. 924, 940 n.114 (1997) (characterizing *Turner* as unanimously extending to inmates fundamental right of marriage established in *Zablocki*).

117 *See Turner*, 482 U.S. at 91.

118 *See* Bradford, *supra* note 10, at 623 (arguing eligible status to remarry is valid corollary to right to marry); Melissa Lawton, Note, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471, 2481 (1998) (stating that right to marry includes right to divorce because of similarity in the voluntary right); Donna J. Zenor, Note, *Untying the Knot: The Course and Patterns of Divorce Reform*, 57 CORNELL L. REV. 649, 652 (1972) (viewing right to end marriage as corollary of right to marry); *see also* Cathy J. Jones, *The Rights to Marry and Divorce: A New Look at Some Unanswered Questions*, 63 WASH. U. L.Q. 577, 643 (1985) (arguing divorce should be treated as fundamental); Lisa E. Martin, *Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's Right to Counsel*, 34 GONZ. L. REV. 329, 338 (1998) (characterizing right to obtain divorce as "fundamental").

119 401 U.S. 371 (1971).

120 *See id.* at 376 (1971).

121 *See Boddie*, 401 U.S. at 373; Mary McCrory Krupnow, Note, *M.L.B. v. S.L.J.: Protecting Familial Bonds and Creating a New Right of Access in the Civil Courts*, 76 N.C. L. REV. 621, 636 (1998) (noting *Boddie* involved indigents seeking divorce who could not pay court costs in advance); *see also* Sosna v. Iowa, 419 U.S. 393, 410 (1975) (upholding one year residency requirement to obtain divorce, characterizing *Boddie*'s filing requirement as "total deprivation," not mere delay).

122 *See Boddie*, 401 U.S. at 383.

imperative that access to judicial relief be unimpeded to every person.[123] According to Justice Marshall, the correlative relationship between the right to divorce and the right to marry, which has been afforded Constitutional protection under the Fourteenth Amendment, was made explicit in *Boddie*: "[W]e recognized that the right to seek dissolution of the martial relationship was closely related to the right to marry, as both involve the voluntary adjustment of the same fundamental human relationship."[124]

The significance of *Boddie's* conferral of a Constitutional right to divorce was illuminated by *United States v. Kras*,[125] where the plaintiff, a bankruptcy petitioner, sought to follow the precedent of *Boddie*, so that the bankruptcy fee provisions of the Bankruptcy Act would be found unconstitutional.[126] The Court distinguished *Kras* from *Boddie*, finding that if the fee barred Mr. Kras from discharging his bankruptcy, his position would not be "materially altered in the Constitutional sense."[127] On the other hand, the access to court denied by the fees to Mr. Boddie involved his marital interests and the "associational interests that surround the establishment and dissolution of that relationship."[128] The Court noted that there have been many

[123] *See* M.L.B. v. S.L.J., 519 U.S. 102, 113 (1996) (stating State must provide access to judicial processes, like marriage dissolution, without regard to party's ability to pay court fees); Meltzer v. C. Buck Le Craw & Co., 402 U.S. 954, 955 (1971) (stating no person can be denied access to civil courts because of inability to pay a fee); *Boddie*, 401 U.S. at 375-76 (noting due process rights are threatened by state monopoly over divorce).

[124] Sosna v. Iowa, 419 U.S. 393, 420 (1975) (Marshall, J., dissenting); *see also* Abdul-Akbar v. McKavie, 2001 U.S. App. LEXIS 1281, at *23 (3d. Cir. 2001) (stating right of judicial access without regard to cost exists for civil cases when denial of judicial forum would implicate fundamental human interest, including ability to obtain divorce); JOEL E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 801-802 (5th ed. 1995) (interpreting choice to marry and divorce as fundamental and subject to strict scrutiny judicial review).

[125] 409 U.S. 434 (1973).

[126] *See id.*, at 434; Standlee v. Arizona, 1991 U.S. App. LEXIS 30594, at *3 (9th Cir. 1991) (citing *Kras* and asserting that bankruptcy "did not rise to the level of a fundamental right"); *Abdul-Akbar*, 2001 U.S. App. LEXIS 1281 at *23 (stating bankruptcy filings are not interests that rise to level of fundamental human interests).

[127] *See Kras*, 409 U.S. at 444-445. *Cf.* Ortwein v. Schwab, 410 U.S. 656, 659 (1973) (holding interest of seeking increased welfare payments does not rise to level of Constitutional significance as interest of obtaining divorce did in *Boddie*); Nickens v. Melton, 38 F.3d 183, 185 n.5 (5th Cir. 1994) (stating right to appeal civil damage suit is not as fundamental as right of marriage).

[128] *See Kras*, 409 U.S. at 444; *see also M.L.B.*, 519 U.S. at 116 (stating that "[c]hoices about marriage. . .[are] among associational rights [Supreme Court] has ranked as 'of basic importance in our society'" (quoting *Boddie*, 401 U.S. at 376)); Zablocki v. Redhail, 434 U.S. 374, 385 n.10 (1978) (stating that "[t]he denial of access to the judicial forum in *Boddie* touched directly on the marital relationship and on the associational interests that

decisions in which it recognized the "fundamental importance of these interests under our Constitution."[129] The court in *Griswold* specifically found the Fourteenth Amendment protected associational freedom implicit in the "zone of privacy".[130] Furthermore Justice Brennan articulated in *Roberts v. United States Jaycees* the Constitutional protection of an individual's right to associational freedom from state regulation.[131] The Bill of Rights, designed to protect individual liberty, must offer "Constitutional shelter" for individuals from unjustified interference from the state in an individual's associational choices.[132] These safeguards are necessary because intimate relations are crucial, not only as sources of emotional enrichment, but also as part of the individual's liberty interest which encompasses the individual's ability to define identity through associational choices.[133]

In *Sousna v. Iowa*,[134] another divorce petitioner was barred from divorce.[135] In that case, the petitioner was barred as a result of residency requirements, since the petitioner had not resided in

surround the establishment and dissolution of that relationship"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating that "[m]arriage is one of the 'basic civil rights of man; fundamental to our very existence and survival").

129 *Kras*, 409 U.S. at 444; *see also Zablocki*, 434 U.S. at 394 (holding Wisconsin state law denying marriage licenses to residents that were unable to fulfill child support obligations unconstitutional, as violation of Due Process); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (recognizing freedom of personal choice in matters of marriage and family life in that they are protected by Due Process Clause).

130 *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (stating marriage promotes socially beneficial consequences); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977) (stating decisions relating to marriage are within outer limits of personal privacy demarked by this court and therefore free from unjustified governmental interference); *LaFleur*, 414 U.S. at 639 (stating that personal choice in matters of marriage and family life are of those liberties protected by Due Process Clause).

131 468 U.S. 609 (1984); *see also* Ward v. Athens City Bd. of Educ., 1999 U.S. App. LEXIS 22766, at *19 (6th Cir. 1999) (stating that marriage to spouse was exercise of First Amendment right to freedom of association); Marcum v. Catron, 70 F.Supp.2d 728, 734 (E.D. Ky. 1999) (stating undue state interference in marital relationships unconstitutionally infringes upon freedom of association); Brown v. Dayton Metro. Hous. Auth., 1993 U.S. Dist. LEXIS 21297, at *17 (S.D. Ohio 1993) (stating that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment" (quoting Moore v. East Cleveland, 431 U.S. 494, 499 (1977))).

132 *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984).

133 *Id.* at 619. *See generally* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 652-66 (1980) (discussing Constitutional doctrinal aspects of individuals' freedom of intimate association).

134 419 U.S. 393 (1975).

135 *See id.*, at 395 (holding where couple with three children moved from New York to Iowa and within month wife petitioned Iowa court for divorce, Iowa court lacked jurisdiction).

the state for the one-year period required by state law.[136] The court found the imposition of a time requirement justified in that it forced those seeking an Iowa divorce to be attached to the state and thereby prevented the state from becoming a "divorce mill."[137] The statute also insulated Iowa's divorce decrees from collateral attack.[138] Moreover, the Court distinguished *Sosna* from *Boddie* by the difference in deprivation endured, characterizing the deprivation in *Sosna* as a mere delay for the new resident as opposed to an exclusion for the indigent in *Boddie* that would last "forever."[139]

Justice Marshall, joined by Justice Brennan, dissented from this view, finding that the residency requirement resulted in "unrecoverable losses."[140] When the year has elapsed, it could

[136] *See id.* at 395. The statute which the Court relied upon, IOWA CODE § 598.6 (1973) provided, in pertinent part: "[a] petition for dissolution of marriage... must state that the petitioner has been for the last year a resident of the state... and that the maintenance of the residence has been in good faith and not for the purpose of obtaining a marriage dissolution...." *Id.* at 395 n.1. At the time *Sosna* was decided, such residency requirements were by no means uncommon, as Iowa was one of forty-eight states to have one. *Id.* at 404. In terms of time duration, such requirements ranged from six weeks to two years. *Id.* at 405.

[137] *See id.*, at 407 (stating power of State to regulate marriage and divorce is near complete and is only limited by specific Constitutional provisions); *Boddie*, 401 U.S. at 385 (Douglas, J., concurring) (asserting that "[t]he State...has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." (quoting Pennoyer v. Neff, 95 U.S. 714, 734-35 (1878))); Simms v. Simms, 175 U.S. 162, 167 (1899) (stating "[w]ithin the States of the Union, the whole subject of the domestic relations...belongs to the laws of the State, and not to the laws of the United States."); *see also Sosna*, 419 U.S. at 404 (adhering to century long jurisprudence and regarded regulation of domestic matters as within "virtually exclusive province of the [state]."); *id.*, at 406-07 (stating residency requirements may be reasonably justified on grounds of significant collateral consequences to State, such as disposition of property and determination of child custody).

[138] *Sosna*, 419 U.S. at 407. The Court held that Iowa had a significant interest in having its divorce decrees recognized by other states in light of the fact that the judicial power of a state to grant a divorce has been traditionally found on the domicile of the petitioner. *Id.* When a divorce decree is entered after a finding of domicile in an ex parte proceeding, the Supreme Court has held that the finding of domicile is not binding upon other States and could be subject to attack. *See* Williams v. North Carolina, 325 U.S. 226, 229 (1945) Thus, the one year residency requirement in *Sosna* was viewed as an effective counter to such collateral antics. *See Sosna*, 419 U.S. at 407. The Court characterized the residency requirement as "precisely the sort of determination that a state in the exercise of its domestic relations jurisdiction is entitled to make." *Id.* at 408-09.

[139] *Sosna*, 419 U.S. at 410. In *Boddie*, 401 U.S. at 383, the Court voided a statute that prohibited an indigent from obtaining access to the state's divorce courts. *Id.* The Court further reasoned that the statute in *Boddie* intended to exclude permanently a certain segment of the population, the poor, from divorce court. *Id.* at 410. The Court held that the one year residency requirement did not amount to the total deprivation imposed on the impoverished petitioner in *Boddie*. *Id.*

[140] *Sosna*, 419 U.S. at 421 (Marshall, J., dissenting) (stating "[the majority's] analysis...ignores the severity of the deprivation suffered by the divorce petitioner).

not be argued that the petitioner was made whole since "the year's wait prevents remarriage and locks both partners into what may be an intolerable, destructive relationship."[141] Moreover, Justice Marshall argued that if the state statute in *Boddie* had required indigents to wait a year before filing for a divorce, that the Court still would have struck down the state law as unconstitutional.[142]

III. THE ROLE OF THE STATE IN DOMESTIC RELATIONS VIS-A-VIS THE FOURTEENTH AMENDMENT

A. Domestic Relations is the Exclusive Province of the State

Despite the Constitutional shelter of the Fourteenth Amendment for the individual's marital rights, both in marriage and its dissolution, the Supreme Court has long held that domestic relations is the "virtually exclusive province of the states."[143] Marriage and divorce have been closely regulated by state legislatures based on an implicit morality.[144] Justice Powell, in his concurring opinion in *Zablocki*, points out that the State is "the collective expression of moral aspirations" and is properly interested in seeing that the rules of domestic relations reflect the values of its people.[145] Within its borders, each state

[141] *See id.* at 422. *Cf.* Memorial Hospital v. Maricopa County, 415 U.S. 250, 269 (1974) (voiding Arizona law which conditioned receipt of medical care in non-emergency cases on one year residency in county); Stanley v. Illinois, 405 U.S. 645, 647-48 (1972) (recognizing injury to unmarried father of being deprived of his child upon death of his wife, if such child were declared ward of state pursuant to state statute); Shapiro v. Thompson, 394 U.S. 618, 637 (1969) (voiding statute which conditioned receipt of welfare payments on one year residency requirement).

[142] *See Sosna*, 419 U.S. at 422, n.2; *see also Boddie*, 401 U.S. at 383-86 (Douglas, J. concurring).

[143] *See Sosna*, 419 U.S. at 404; Pennoyer v. Neff, 95 U.S. 714, 734-735 (1878) (finding state has absolute right to establish conditions for marriage and divorce); Barber v. Barber, 62 U.S. 582, 584 (1859) (disclaiming federal jurisdiction in divorce); *see also* Jonathan Deitrich, *The Lessons of the Law: Same Sex Marriage and Baehr v. Lewin*, 78 MARQ. L. REV. 121, 125-26 (1994) (discussing States' traditional role in marriage regulation and impact of Fourteenth Amendment).

[144] *See Zablocki*, 434 US at 398 (Powell, J., concurring) (noting marriage and divorce were originally subject to regulation by ecclesiastical authorities); *see also* Maynard v. Hill, 125 U.S. 190, 209 (1888) (affirming that noncompliance of statutory law severs former wife's right to property); J. Thomas Oldham, *Divorce Reform at the Crossroads*, 80 CAL. L. REV. 1091, 1103 (1992) (discussing counterproductive effect morality plays in removing "fault" factor in divorce proceedings).

[145] *See Zablocki*, 434 U.S at 399. *But see* Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L.

has defined what constitutes the institution of marriage: proscribing at what age a person can marry, defining the procedure for marriage, the duties and obligations of the parties, the property rights of the parties and the grounds for dissolution.[146] State laws have also banned incest, bigamy, and homosexuality, and required bloods tests as preconditions for marriage.[147]

B. The Constitutional Infirmity of New York Divorce Law

While the law of domestic relations is controlled by the state and wholly within its dominion, the state still must act within Constitutional limits.[148] When an individual's protected marital rights are abridged by the state, "the question is whether the state interests that support the abridgment can overcome the substantive protections of the constitution."[149] In this inquiry, the issue is whether New York divorce law which results in the permanent deprivation of fundamental marital rights can be overcome by state interests.[150]

1. The 1966 Liberalization as a Safeguard of the New York Legal System

In 1966, the legislature liberalized the divorce laws by enlarging the grounds for divorce to include abandonment without justification,[151] and cruel and inhuman treatment.[152]

REV. 385, 394 (2000) (discussing states' use of divorce and marriage regulation as sociopolitical tools rather than moral regulation).

[146] *See Maynard*, 125 U.S. at 209 (interpreting Oregon Donation Act, 9 Stat. 496 (1850)); *see also* Brian H. Bix, *State of the Union: The States' Interests in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 15 (2000) (recognizing United States domestic relations law has traditionally been under state control).

[147] *See Zablocki*, 434 U.S. at 399; *see also* Lynne Marie Kohm, *Marriage and the Intact Family: The Significance of Michael H. v. Gerald D.*, 22 WHITTIER L. REV. 327, 328 (2000) (discussing increasing conflict between individual rights and family rights and its effect on government regulation).

[148] *See Zablocki*, 434 U.S. at 392; *see also* Melissa Lawton, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471, 2481 (1998) (discussing uncertainty in interpreting Constitutional case law concerning right to marry).

[149] *See Zablocki*, 434 U.S. at 391, 392; *see also* Lawton, *supra* note 148, at 2481 (discussing uncertainty in interpreting Constitutional case law concerning right to marry).

[150] *See generally* E. Todd Wilkowski, *The Defense of Marriage Act: Will it be the Final Word in the Debate over Legal Recognition of Same Sex Unions*, 8 REGENT U. L. REV. 195, 200 (1997) (discussing *Zablocki* v. *Redhail* and marriage as a fundamental right).

[151] *See* Carpenter v. Carpenter, 718 N.Y.S.2d 105, 106 (2000) (ruling abandonment

While recognizing that divorce was warranted under these intolerable circumstances, the 1966 law was also concerned with the visible fraud that was being perpetrated on the judicial system.[153] With adultery as the sole ground for divorce, the judiciary was faced with collusion by the parties, in which the parties agreed to secure a divorce by manufacturing adultery through perjurious testimony.[154]

The liberalization of the divorce laws not only added the "new" fault grounds, but it also included the ability to obtain a divorce after two years of separation (amended later to one year).[155] Separation could be obtained under an agreement of separation or by a judicial decree of separation awarded to a plaintiff for essentially the same grounds as a divorce.[156] The so-called "conversion divorce," whereby the separation agreement or separation decree converts to a divorce after one year, has been said to be the New York equivalent of no-fault divorce[157] because the conversion divorce does not require fault for the divorce to be granted.[158]

The purpose for offering this option was to eliminate two of the

need not be established as ground for divorce).

152 *See* N.Y. DOM. REL. LAW §170(1) (West 2000); Warguleski v. Warguleski, 435 N.Y.S.2d 857 (1981) (Hancock, J., dissenting) (discussing what facts are necessary to establish "cruel and inhuman" treatment). *See generally* Barnier v. Barnier, 349 N.Y.S.2d 113 (discussing spousal abuse).

153 Joint Legislative Comm. On Matrimonial and Family Law, No. 8, at 87 (N.Y. 1966).

154 *See* In Re Forrester, 155 N.Y.S. 420 (App. Div. 1915) (discussing attorney misconduct in hiring woman to seduce client's spouse to establish "fault"); Berndt v. Berndt, 225 N.Y.S. 404 (Sup. Ct. 1927) (discussing false accusations of adultery); Pepin v. Pepin, 206 N.Y.S. 732 (Sup. Ct. 1924) (discussing legal effect of one spouse condoning other's adulterous affairs).

155 *See* N.Y. DOM. REL. LAW §170 (5), (6) (Consol. 2000).

156 *See* N.Y. DOM. REL. LAW §170(5), (6) (Consol. 2000). *See generally* Cicerale v Cicerale, 382 N.Y.S.2d 430 (Sup. Ct. 1970) (invalidating separation agreement due to improper execution); Martin v Martin, 312 N.Y.S.2d 520 (Sup. Ct. 1970) (granting divorce where parties to separation agreement have fulfilled terms and two years have passed).

157 *See* Jacobs *supra* note 2, at 42 (discussing no fault divorces). *See generally* Ira Ellman, *The Place of Fault in Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996) (discussing rise of no- fault divorce laws); J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 CALIF. L. REV. 1091 (1992) (reviewing DIVORCE REFORM AT THE CROSSROADS, (Stephen D. Sugarman & Herma Hill Kay eds., 1990) which compiled opinions on whether no-fault divorce has been fair or in society's best interests).

158 *See* Gleason v. Gleason, 256 N.E.2d 513, 516 (N.Y. 1970) (stating that "as is apparent, the legislative design was to render this a basis for divorce, it follows that it makes no difference whether it is the 'innocent' or 'guilty' party who seeks to convert the judicial separation into a final divorce"). *See generally* Shapiro v. Shapiro, 298 N.Y.S.2d 785 (Sup. Ct. 1969) (discussing fault in divorce proceedings); Ullo v. Ullo, 453 N.Y.S.2d 559 (Sup. Ct. 1982) (dealing with fault in divorce proceedings).

"chief evils" under the prior divorce law: collusive or fraud-ridden divorce based on fabricated claims and migratory divorce,[159] which werethreatening the integrity of the legal system.[160] The legislature finally recognized the necessity of divorce in a "dead marriage," culminating in the creation of the"conversion divorce."

Implicit in the statutory scheme is the legislative recognition that it is *socially and morally undesirable* to compel couples to a dead marriage to retain an illusory and deceptive status and that the best interests not only of the parties but of society itself will be furthered by enabling them "to extricate themselves from a perpetual state of marital limbo."[161]

Although the conversion divorce was successful in permitting non-contesting spouses to extricate themselves from each other and in freeing the judiciary from the visible collusive perjury rampant under the old law, the Divorce Reform of 1966 was not as helpful to an individual whose petition for divorce was contested by the other spouse.[162] While the two new fault grounds of cruel and inhuman treatment and abandonment were added to the law, the requirements to succeed under theses grounds were at times insurmountable.[163] There may well be a

[159] *See Gleason*, 26 N.Y.2d at 39 (discussing dangers of false claims in divorce proceedings). *See generally* Rappel v. Rappel, 240 N.Y.S.2d 692 (Sup. Ct. 1963) (denying full faith and credit to Nevada divorce where proponent was continuously domiciled in New York and had traveled to Nevada specifically for that purpose); Perrin v. Perrin, 250 N.Y.S. 588 (Sup. Ct. 1931) (invalidating Pennsylvania fault based divorce where proponent's spouse made no appearance nor was personally served).

[160] *See* Jacobs, *supra* note 2, at 35.

[161] *Gleason* 26 N.Y.2d at 35 (quoting Adelman v. Aldelman, 59 Misc. 2d. 803, 805 (N.Y. 1969)) (emphasis added).

[162] *See, e.g.*, Biegeleisen v. Biegeleisen, 676 N.Y.S.2d 684, 685 (App. Div. 1998) (holding that in action for divorce on ground of cruel and inhuman treatment, proponent must show serious misconduct, and not mere incompatibility); *see also* McGill v. McGill, 432 N.Y.S.2d 1015, 1016 (App. Div. 1980) (dissenting opinion) (stating that burden for finding adultery is clear and convincing, and refusal to answer key questions regarding adulterous affairs by itself may only show a finding of preponderance); Wenderlich v. Wenderlich, 311 N.Y.S.2d 797, 798 (App. Div. 1970) (finding that being struck once was inadequate to show cruel and inhuman treatment). *See generally* Schapiro v. Schapiro, 276 N.Y.S.2d 678 (App. Div. 1967) (finding husband guilty of cruel and inhuman treatment).

[163] *See* Joel R. Brandes, *'Hessen' Revisited-The Cruelty Ground for Divorce*, N.Y.L.J., Jan 25, 2000, at 3 (reporting conduct constituting cruel and inhuman treatment in Hessen v. Hessen, 33 N.Y.2d 406, 410 (1974), was upheld in Brady v Brady 64 N.Y.2d 339, 344 (1985)); *see, e.g.*, Hessen v. Hessen, 308 N.E.2d 891, 892-93 (N.Y. 1974) (denying husband divorce despite trial court's finding that "wife had been uncooperative, stubborn, unfair, unreasonable and irrational in her treatment of the plaintiff"); *see also* Johnson v. Johnson, 561 N.Y.S.2d 1018 (App. Div. 1990) (finding imprisonment for over fifteen years does not constitute abandonment because "one of the elements of such a cause of action is an unjustified separation").

"dead marriage" in which both parties were engaged in adultery,[164] or where the sexually abandoned spouse could not succeed because the abandoned spouse has not repeatedly asked for conjugal relations for one year,[165] or where the mistreatment does not rise to "cruel and inhuman".[166] In addition, New York divorce law offers no remedy to those spouses who are in a "perpetual state of marital limbo" as were the parties in *Gleason*.[167] The statute deems it "morally and socially" proper to grant a divorce in a "dead marriage," yet installs permanent obstacles to non-functioning marriages when one spouse contests the divorce.[168] While *Gleason* articulates a non-fault ethic, stating, "if there is no longer a viable marriage, the question of fault, of 'guilt' or 'innocence,' is irrelevant."[169] This contradicts New York's— fault-based law when an agreement to separate is unattainable.[170]

[164] *See* Silverman v. Silverman, 632 N.Y.S. 2d 393, 397 (Sup. Ct. 1995) (citing 1967 Divorce Reform Act as precluding parties from remedy when they have committed adultery); *see, e.g.*, Recht v. Recht, 321 N.Y.S.2d 395,396 (App. Div. 1971) (denying decree of divorce granted where both parties committed adultery). *But see* Hall v. Hall, 208 N.Y.S. 814, 814 (App. Div. 1924) (granting absolute divorce when both parties committed adultery).

[165] *See* Lyons v. Lyons, 589 N.Y.S.2d 557, 559 (App. Div. 1992) (stating spouse must prove abandoning spouse unjustifiably refused to fulfill basic obligations arising from marriage contract for one year); *see also* George M. v. Mary Ann M., 567 N.Y.S.2d 132, 133 (App. Div. 1991) (citing rule of one year); Casale v. Casale, 489 N.Y.S.2d 775, 776–77 (App.Div. 1985) (holding conduct must be unjustified). *See generally* Nicholson v. Nicholson, 449 N.Y.S.2d 4, 5 (App. Div. 1982) (holding divorce cause of action could not be sustained on ground of constructive abandonment).

[166] *See* Murphy v. Murphy, 683 N.Y.S. 2d 650, 651 (App. Div. 1999) (citing two incidents between parties involving excessive drinking, name-calling, accusations and recriminations); *see also* Arunas v. Arunas, 644 N.Y.S.2d 520, 521 (App. Div. 1996) (holding conduct consisting of offensive name calling, disputes over finances, failure to speak or communicate for periods of time, and failure to sympathize do not meet standard necessary for a divorce). *See generally* Doyle v. Doyle, 625 N.Y.S.2d 693–94 (App. Div. 1995) (holding that defendant's conduct must rise to level of being unsafe or improper).

[167] 256 N.E.2d 513, 516 (N.Y. 1970).

[168] *See* Varreris v. Fisher, 632 N.Y.S.2d 397 (Sup. Ct. 1995) (dismissing suit when both parties commit adulterous affairs); Lyons v. Lyons, 187 A.D.2d at 416 (stating that action for withholding conjugal relations must be for minimum of one year); *see also* Tuttman v. Kattan, 83 N.Y.S. 2d 651 (App. Div. 1948) (holding verbal abuse is not sufficient for divorce).

[169] *Gleason*, 26 N.Y.2d at 34.

[170] *See* N.Y. DOM. REL. LAW § 170 (West 2001) (giving six ways action for divorce can be granted); *see also* Jeffrey v. Jeffrey, 172 A.D.2d 719, 719 (N.Y. App. Div. 1991) (stating law does not allow divorce on basis that party was compelled to leave her spouse). *See generally* Kern v. Kern, 495 N.Y.S.2d 776, 777 (App. Div. 1985) (finding fault based divorce where spouse's emotional outbreaks were precipitated by her abuse of alcohol).

2. The New York Law Cannot Justify Permanent Denial of a Fundamental Right

Thus, the New York law creates a statutory classification of persons who cannot exercise a fundamental right.[171] Those denied divorce are permanently deprived of their associational and decisional freedom to divorce and re-marry by the overreaching intrusion of the state in their personal lives.[172] "When a statutory classification significantly interferes with a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[173] If New York divorce law is to be Constitutionally valid, there must be sufficiently important state interests.[174] These interests must be of sufficient merit to justify denying the right to marriage and divorce, which are association and decisional freedom guaranteed by the Fourteenth Amendment.[175]

Since New York has recognized the need for extrication from a "dead marriage," there is no rational justification for requiring denial of associational freedoms that other citizens are imbued with.[176] Not only does this violate substantive due process, equal protection issues may arise as well, since the state is condoning disparate treatment for similarly situated individuals.[177] Furthermore, *Eisenbrandt* and *Roe* make clear that the substantive due process protections identified in *Griswold* were rights accruing to individuals, and not solely to married couples.[178] Therefore the Constitutional rights recognized in *Gleason* should be available equally to all.[179]

While almost every state legislature has addressed the problem of the individual unable to secure a divorce in a non-functional marriage,[180] New York does not give such individuals

171 *See supra*, nn. 118-147 & accompanying text.
172 *See supra*, nn. 118-150 & accompanying text.
173 *Zablocki*, 434 U.S. at 388.
174 *See supra*, nn. 118-142 & accompanying text.
175 *See generally* N.Y. DOM. REL. LAW § 170 (Consol. 2000).
176 *See supra*, n. 161 & accompanying text.
177 *See supra*, notes 118-150 & accompanying text.
178 *See supra* notes 93-101 & accompanying text.
179 U.S. CONST. amend. XIV.
180 *See supra* nn. 2-3 & accompanying text.

any remedy.[181] Since these individuals are suffering permanent deprivation as a result of the state's monopoly on marital dissolution, their deprivation would bring them within the *Boddie* infirmity criteria.[182]

3. The Divorce Law Fails to Accomplish Its Goals

While inflicting permanent deprivation on some individuals, the New York divorce laws cannot claim to satisfactorily accomplish state interests.[183] Despite the liberalization of the 1966 law, the New York legal system still wrestles with the "chief evils" of perjury and evasion that the 1966 reform law were designed to correct. In contested divorce actions based on fault grounds where there is reason to destroy credibility, perjury is still commonplace according to New York divorce lawyers.[184] The evasive route of migratory divorce still remains to those who are permanently barred from securing a New York divorce.[185] Moreover, this evasion appears to be condoned by the Supreme Court.[186] Additionally, the permanent deprivation to divorce is contradictory to public policy, which finds it socially and morally offensive to keep couples locked in dead marriages.[187] Thus, the New York divorce law is defective because it deprives a fundamental liberty right guaranteed under the Fourteenth Amendment and this encroachment does not satisfy strict scrutiny analysis.[188]

181 *See* N.Y. DOM. REL. LAW § 170 (Consol. 2000).

182 *See Boddie*, 401 U.S. at 375-76 (stating where state has monopoly over methods of dispute settlement, it infringes on defendants' rights).

183 *See supra*, nn. 159-170 & accompanying text.

184 KAREN WINNER, DIVORCED FROM JUSTICE 62-64 (1996) (discussing common tactic of perjury in New York divorce proceedings).

185 *See, e.g.*, Zweig v. Zweig, 154 Vt. 468 (Sup.Ct. 1990), *cert. denied*, 498 U.S. 942 (1990) (holding that divorce where parties had been living apart for fifteen years was not barred by New York *res judicata*, which denied divorce on fault grounds).

186 *See* Zweig v. Zweig, 498 U.S. 942 (1990) (denying certiorari to defendant-appellant whose was divorced in Vermont after denial of divorce in New York).

187 *See Gleason*, 256 N.E.2d at 516 (stating that to compel couples to stay in dead marriages is not in best interests of the parties or society).

188 *See Zablocki*, 434 U.S at 395 (holding Wisconsin statute unconstitutional under Fourteenth Amendment because it interfered with fundamental right to marry, and it could not be justified on basis of state interest).

IV. THE ENIGMA OF THE NEW YORK FAULT-BASED LAW VIS-A-VIS THE DIVISION OF PROPERTY

According to Lenore Weitzman's study of the California no-fault divorce law, women were adversely affected economically by no-fault law.[189] The economic effect was felt in two ways: first, loss of leverage in property settlement negotiations, and second, as a result of division of property without regard to the fault of the parties.[191]

A. The "Weitzman Thesis" That No-Fault Caused Women to Lose Leverage in Divorce

The Weitzman Thesis posits that fault-based divorce gave women who were otherwise economically dependent on their spouses, leverage in the economic outcome of divorce.[192] The thesis first assumes that the husband is seeking the divorce, and that the wife would not herself seek a divorce.[193] Under the New

[189] *See* WEITZMAN, *supra* note 2, at 26 (stating consequences of no-fault divorce law fall most heavily on economically weaker wife); *see also* Biondi, *supra* note 106, at 624 (noting reform of fault based divorce laws is less equitable in system where women are at economic disadvantage compared to men); Marsha Garrison, *Equitable Distribution in New York: Results and Reform: Good Intentions Gone Awry: The Impact of New York Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 633 (1991) (discussing effect of 1960's divorce reform on women's declining per capita income and standard of living following divorce).

[191] *See* WEITZMAN, *supra* note 2, at 12 (stating that under previous law, property awards were linked to fault); *see also* Biondi, *supra* note 108, at 620-21 (stating fault based divorce gives women added leverage by facilitating greater beneficial settlements, receipt of greater economic shares of property and spousal support, and creation of false fault grounds in situations where only husband wants divorce but cannot obtain one without his wife's approval); Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 801-802 (1983) (discussing argument that no-fault divorce decreases economically dependent woman's bargaining power and prevents sympathetic courts from responding to her economically disadvantaged situation).

[192] *See* WEITZMAN, *supra* note 2, at 26 (stating that "[t]he no-fault rules have eliminated the lever that lawyers used under the old law to get decent economic settlements for wives."); *see also* Biondi, *supra* note 108, at 620 (noting that fault based divorce provides leverage for economically disadvantaged spouses, usually women, to obtain economic support from their spouses); Winner, *supra* note 184, at 34 (arguing that "[w]hen a man no longer had to seek his wife's consent for a divorce, women lost their leverage in divorce settlements").

[193] *See* WEITZMAN *supra* note 2, at 27–29 (noting New York divorce statistics actually indicate more women seek divorce than men). *But see* Lloyd Cohen, *Marriage, Divorce, and Quasi Rents: Or, "I Gave Him the Best Years of My Life"*, 16 J. LEGAL STUD. 267, 268 (1987) (arguing present value of wife's human capital contribution to marriage declines faster and earlier than husband's, thus inducing him to seek divorce first).

York fault law, the wife can contest the divorce and the grounds would likely fail for a lack of fault. She could also threaten to counterclaim for divorce and air the husband's fault at a public trial.[194] This resistance and threat of trial are said to have given her leverage otherwise lost in a no-fault regime when faced with a divorce action by her spouse.[195]

While fault-based divorce might have allowed for this tactic, it would seem to be counter to the legislative intent as articulated in the 1966 Committee Report.[196] In at least one place the legislators were concerned about "avaricious wives" taking actions merely as negotiation strategies.[197] The legislators characterized such actions, not as leverage, but as extortion.[198] Based on this legislative intent, women's groups who have fought to keep New York divorce fault-based as leverage do not have a legally tenable position.[199]

194 *See* WEITZMAN, *supra* note 2, at 9 (indicating threats of exposing culpable spouse's actions at public trial persuaded parties to agree to out of court financial settlement); *see also* Biondi, *supra* note 108, at 620-21 (explaining when fault ground exists, wife may demand settlement by threatening public trial); Winner, *supra* note 184, at 34 (concluding that whereas women had leverage in divorce settlements under fault-based regimes, no-fault divorce has allowed powerful party to blackmail his/her spouse).

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196 Joint Legislative Comm. On Matrimonial and Family Law, No. 8, at 87 (N.Y. 1966).

197 *See id.*

198 *See id.*; [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 16-47 to 16-48 (asserting recommendation of Joint Committee to preclude greedy spouse from extorting large sums of money in form of property settlement); Peter J. Galasso, *Matrimonial Law Struck a Chord*, N.Y.L.J., July 12, 2000, at 2 (stating use of non-economic basis to exact economic benefit seems to fit definition of 'extortion'); *see also* Alexandra Leichter, *The Problem of Getting the 'Get'; Impact of Jewish Divorce Law on Matrimonial Litigation*, MATRIMONIAL STRATEGIST, July 1998, at 4 (noting New York's "Get Law" enables courts to award larger proportionate interest in marital property and/or increase spousal support award to wives whose husbands would otherwise attempt extortion in exchange for "the get'").

199 *See* [1 Matrimonial Actions] NEW YORK CIVIL PRACTICE, *supra* note 22, at 16-47 to 16-48 (stating Advisory Committee "felt that the necessity for the plaintiff to prove an unjustified leaving by the defendant, . . . was sufficient protection"); Oliver Koppell, *In Defense of Divorce Reform 1990*, N.Y.L.J., May 18, 1990, at 2 (opining "objection[s] to divorce on no-fault grounds is the loss of the 'leverage' [that is] now in the hands of the party against whom the divorce is sought. A less polite expression for this 'leverage' is the opportunity for extortion"). *See generally* Gary Stein, *Jail Worked on Ex Who Didn't 'Get' It*, SUN-SENTINEL (Fort Lauderdale), Aug. 30, 1996, at 1B (discussing husband's tremendous leverage in Jewish divorce negotiations because only he is empowered to give "the get").

B. Property Division by Judicial Award Discounts Fault as a Criteria in Redistribution

While current New York divorce law was enacted in 1966, before the passage of the reform oriented 1970 California no-fault divorce law, New York property division law was enacted in 1980 and reflected a no-fault perspective.[200] Under this law, consideration of the fault of the parties with regard to property redistribution will only be considered where the marital misconduct is judged "egregious."[201] Therefore, when a divorce is granted, even under a fault ground, fault is rarely germane to the determination of property division.[202] Leaving the fairness of New York's property division law aside, the inapposite premises of these intertwined statutes are irreconcilable.[203] Ironically, in many states where it is possible to obtain a no-fault divorce, fault will be one of the factors used in the property division.[204] This

[200] *See* N.Y. DOM. REL. LAW § 236(b)(5), (d)(13) (Consol. 2000) (directing courts to consider "any other factor which the court shall expressly find to be just and proper"); Freed & Brandes, *supra* note 1, at 22 (criticizing 1966 reform as inadequate and falling short of meeting all legitimate desires and needs of trouble families). *See generally* Barbara Bennet Woodhouse, Symposium, *Sex, Lies and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2534 (1994) (indicating trend toward "fault blindness," with statutes of one quarter of the states using general fault-based factors as one of many relevant considerations in property distribution).

[201] *See* O'Brien v. O'Brien, 489 N.E.2d 712, 718 (N.Y. 1985) (noting marital fault should be considered in equitable distribution of marital property in egregious cases which shock conscience of court); Rosenberg v. Rosenberg, 510 N.Y.S.2d 659, 662 (App. Div 1987) (calculating fault only where misconduct was so egregious as to shock conscience of court), *appeal denied*, 70 N.Y.2d 601 (1987); *see, e.g.*, Havell v. Islam, 718 N.Y.S.2d 807, 811 (Sup. Ct. 2000) (holding pattern of domestic violence, if properly proven, is just and proper factor to be weighed in equitable distribution of property).

[202] *See* Blickstein v. Blickstein, 472 N.Y.S.2d 110, 113 (App. Div. 1984) (stating occasions in which fault should be considered in determining distribution of property will be very rare and will involve situations in which "marital misconduct is so egregious or uncivilized as to bespeak of blatant disregard of marital relationship"); Jacobs, *supra* note 2, at 166 (noting fault has been banished from most divorce proceedings and replaced by new criteria to determine property division); Cerisse Anderson,. *Lower Standard Set For Evidence of Abuse; Pattern of Violence Ended in Attack with Barbell*, N.Y.L.J., Dec. 19, 2000, at 1 (explaining New York's general rule which excludes marital fault when considering equitable distribution except for "egregious cases that shock the conscience" of court).

[203] *See* N.Y. DOM. REL. LAW § 170 (Consol. 2000) (listing six grounds for divorce action: cruel and inhumane treatment, abandonment, confinement in prison, adultery, one year separation decree or a written separation agreement); *Blickstein*, 472 N.Y.S.2d at 113 (holding considerations of marital fault are irrelevant to basic assumptions underlying equitable distribution law such that each party has made contributions to marital partnership and upon its dissolution each is entitled to his or her fair share); Jacobs, *supra* note 2, at 167 (noting men are routinely viewed as responsible for accretion of marital assets and therefore receive larger percentage of assets upon divorce).

[204] *See O'Brien*, 66 N.Y.2d at 589 (holding court may consider marital fault just and proper factor in equitable distribution); *Blickstein*, 472 N.Y.S.2d at 113 (recognizing

further undermines the public policy justification for New York fault-based divorce law since fault is a basis on which a divorce is granted, but it is not a basis for the property division.[205] The distributive award can result in a lopsided distribution, awarding the "guilty" spouse a greater share of the property due to his greater economic contribution to the marriage.[206]

CONCLUSION

The interests of the state cannot be said to justify the New York fault-based divorce statute because it impinges on fundamental Constitutional freedoms protected under the Fourteenth Amendment. In fact, the divorce statute dating from 1966 is so flawed as to contradict its own stated purposes, as expressed by the legislative committee report and articulated by the *Gleason* court.

Moreover, the divorce statute is irreconcilable with the no-fault tenets of the New York's property division law, it's corollary statute. The sanguine effect of fault as providing leverage in the bargaining process to the older female spouse cannot be sustained under the legislature's stated aversion to such tactics.Nor can a statute that infringes on Constitutional rights be sustained based on the pretext that it affords leverage to the disadvantaged spouse in an adversarial arena.

If the divorce law produces unjust financial consequences, then

marital fault in some cases by virtue of its extraordinary nature may be relevant and should be considered when distributing marital property upon dissolution of marriage); HOMER HARRISON CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, § 16.03 at 182 & n.20 (2d ed. 1988) (allowing fault to be considered in equitable distribution of property in States of Connecticut, Florida, Maryland, Massachusetts, Missouri, New Hampshire, Rhode Island, South Carolina, Vermont, Virginia and Wyoming, but Florida and Virginia will limit consideration of marital misconduct with economic impact).

205 *See* N.Y. DOM REL. LAW § 236(b)(5), (d)(13) (Consol. 2000) (stating court may consider any factor which is just and proper in property division). *See generally* Winner, *supra* note 172, at 34 (noting that women's groups have fought against bills with provisions that offer economic protection to women when these bills have included no-fault provisions). *But see* Nicolla v. Nicolla, 513 N.Y.S.2d 305, 306 (App. Div. 1987) (noting allegations of adultery would not affect equitable distribution because no apparent extraordinary circumstances existed).

206 *See* WEITZMAN, *supra* note 2, at 15-16; *see also* Kobylack v Kobylack, 442 N.Y.S.2d 392, 395 (Sup. Ct. 1981) (concluding fault should be used "only as a consideration to tilt the balance where there are insufficient assets to make the parties economically whole"), *reversed on other grounds*, 62 N.Y.2d 399, 402 (1983). *See generally* Giannola v. Giannola, 441 N.Y.S.2d 341, 343 (Sup. Ct. 1981) (holding while fault can be relevant it would not preclude distributive award since under equitable distribution "each party to the marriage is entitled to take with him, that which he contributed").

the state lawmakers must examine the Equitable Distribution Law. First, it must reconsider the bar on lifetime alimony that results in inadequate financial protections to older homemakers who may not be able to find employment at advanced ages. Second, the legislature must reexamine its reluctance to accept a partnership analogy for the marriage contract. The question must be addressed whether it is equitable to continue to make asset distributions based on contribution to the marital assets that do not presume a 50-50 split, and usually result in larger property awards to economically successful husbands because women generally earn lower wages in the workplace while assuming the greater burden of family responsibilities. If property distributions were based on more equitable principles, it would not be necessary to resort to leverage to achieve fairer property division outcomes by means of the constitutionally flawed fault-based ground requirements. There is simply no acceptable justification for the fault-based regime and it is high time that New York reformed its divorce law as almost every other state in the nation has done, so that its statutes comport with Constitutional imperatives that guarantee individuals the fundamental rights of association and personal autonomy.